

**Matter of Lynah v New York City Police Dept.**

2010 NY Slip Op 30211(U)

January 27, 2010

Supreme Court, New York County

Docket Number: 402125/09

Judge: Joan B. Lobis

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SCANNED ON 1/29/2010  
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JOAN B. LOBIS

PRESENT: \_\_\_\_\_

PART 6

Index Number : 402125/2009

LYNAH, EARL

vs

NYC POLICE DEPT.

Sequence Number : 001

ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE 11/2/09

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 25 were read on this motion to/tor Art. 78 Petition

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Art. 78 1-11

Ans. 12-23

24-25

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion \_\_\_\_\_

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

PETITION  
~~MOTION DECIDED IN ACCORDANCE WITH~~  
ACCOMPANYING DECISION AND ORDER, AND JUDGMENT

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1418).

Dated: 1/27/10

JBL  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

-----X  
In the Matter of the Application of EARL LYNAH,

Petitioner,

For a Judgment pursuant to Article 78, C.P.L.R.

-against-

Index No. 402125/09  
**Decision, Order,  
and Judgment**

NEW YORK CITY POLICE DEPARTMENT

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).

-----X  
JOAN B. LOBIS, J.S.C.:

Petitioner Earl Lynah, proceeding *pro se*, brings this proceeding under Article 78 of the C.P.L.R. to annul the decision of respondent New York City Police Department ("NYPD"), denying him a Premises/Residence Gun License (the "Premises License"); to order respondent to issue to petitioner a Premises License; and to award petitioner lost earnings for respondent's failure to issue to him a Premises License. For the reasons stated below, the petition is denied.

In 2006, petitioner, who at the time was a Westchester County resident, applied for a license to possess and carry a firearm with the Westchester County Police Commissioner. His license was approved, and he began working for a security services company based in Westchester County. In 2007, petitioner moved to Bronx County. Petitioner asserts that when he moved to Bronx County the respondent granted him a "Carry Guard License," though there is no documentation to support this claim. Petitioner annexed to his petition a copy of an "Armed Guard" license, which has an expiration date of December 11, 2010, and an "Armored Car Guard" license, which has an expiration date of November 22, 2009. Those licenses were issued by New York State,

not respondent. On February 15, 2008, petitioner applied to respondent for a Premises License.

On March 4, 2008, NYPD officers responded to a suspected burglary at petitioner's apartment. The officers investigated the premises and found no evidence of a burglary; they did discover petitioner's gun holster. The officers inquired about the holster, at which point petitioner showed them his handgun. Petitioner was arrested for possessing a loaded, unlicensed handgun in violation of New York Penal Law Section 400(6). According to petitioner, his February 2008 application for a Premises License was denied because of his arrest. In March of 2008, petitioner stopped working as a security guard.

Pursuant to the decision and order of the Hon. Troy K. Webber, dated December 15, 2008, petitioner's criminal case was dismissed in the interest of justice. Justice Webber noted that "[i]t is clear that defendant was in possession of the weapon and ammunition." However, Justice Webber cited to a number of factors—including petitioner's character and the fact that he had applied for a Premises License with the NYPD prior to his arrest—that warranted a dismissal of the criminal case.

On January 15, 2009, petitioner re-applied for a Premises License. On the application, petitioner admitted to his March 2008 arrest. He further informed the NYPD of an October 5, 2003 arrest in which he was charged with driving with a suspended license, and a August 15, 1992 arrest for turnstile jumping. He had pled guilty to disorderly conduct on the charges related to turnstile jumping, and the charges related to the suspended driver's license were apparently

dropped. Petitioner's criminal history reveals that the 1992 arrest included a charge for possession of a controlled substance. He was also charged with marijuana possession in New Jersey on November 21, 1992.

On March 4, 2009, respondent denied petitioner's application for a Premises License. Respondent set forth that it considered all of petitioner's arrests, but cited the two most recent arrests as indications that petitioner had "poor judgment and disregard for the law." Petitioner promptly appealed. On April 23, 2009, respondent issued a Notice of Disapproval After Appeal, in which respondent focused entirely on petitioner's gun possession arrest. It cited his possession of an unlicensed gun in New York City, as well as his failure to safeguard the gun with respondent while awaiting a Premises License, as behavior demonstrating that petitioner had "a lack of character and fitness to possess firearms."

Petitioner argues that the Board's findings were arbitrary and capricious and shocking to one's sense of fairness, because he has good moral character; he needs the gun license in order to be a security guard and earn a livelihood; and, his gun possession charge was not serious and was ultimately dismissed. Petitioner also argues that he has a Second Amendment right to own and possess a handgun, but he sets forth that he has reserved that argument pending a United States Supreme Court decision on whether the Second Amendment is applicable to the states. Petitioner seeks an order directing respondent to issue him the Premises License and to pay his lost wages that he would have earned had he continued work as an armed security guard. Respondent argues that petitioner's criminal history and failure to abide by

safekeeping regulations were grounds for a denial of a Premises License. Respondent further argues that the Second Amendment is not applicable to the states and if it was the NYPD's licensing rules comport with District of Columbia v. Heller, 128 S. Ct. 2783 (2008), the landmark Second Amendment case.<sup>1</sup>

As a preliminary matter, petitioner is not entitled to lost wages under C.P.L.R § 7806. Under Section 7806, "damages granted to the petitioner must be incidental to the primary relief sought by the petitioner." Lost wages damages are only appropriate when the petitioner is employed by the respondent and the respondent has a "statutory duty" to pay the wages. See Adams v. New York State, 51 A.D.2d 668, 668-69 (4th Dep't 1976); see generally Gross v. Perales, 72 N.Y.2d 231(1988). Petitioner is not an employee of the NYPD, thus, he is not entitled to lost wages.

In New York City, the NYPD has the sole authority to issue Premises Licenses pursuant to the New York Penal Law, Article 4, and the New York City Administrative Code § 10-131. Penal Law § 400.00 provides in pertinent part, that,

[n]o license shall be issued or renewed pursuant to this section except by the licensing officer, and then only after investigation and finding that all statements in a proper application for a license are true. No license shall be issued or renewed except for an

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<sup>1</sup> Currently, petitioner's Second Amendment claim has no merit. See e.g. Heller, 128 S. Ct. at 2813 n.23; Maloney v. Cuomo, 554 F.3d 56, 58 (2d Cir. 2009). Furthermore, several recent court decisions hold that, even if the Second Amendment is applicable to the states, Heller does not limit New York's licensing laws. In re Wisotsky v. Kelly, 23 Misc.3d 1137(A) (N.Y. Sup. Ct. 2009); People v. Perkins, 62 A.D. 1160, 1161 (3d Dep't 2009); People v. Ferguson, 21 Misc.3d 1120(A) (N.Y. City Crim. Ct. 2008).

applicant (a) twenty-one years of age or older, provided, however, that where such applicant has been honorably discharged from the United States army, navy, marine corps, air force or coast guard, or the national guard of the state of New York, no such age restriction shall apply; (b) of good moral character; (c) who has not been convicted anywhere of a felony or a serious offense; (d) who has stated whether he or she has ever suffered any mental illness or been confined to any hospital or institution, public or private, for mental illness; (e) who has not had a license revoked or who is not under a suspension or ineligibility order issued pursuant to the provisions of section 530.14 of the criminal procedure law or section eight hundred forty-two-a of the family court act . . . and (g) concerning whom no good cause exists for the denial of the license.

“In making a determination on a pistol license, the licensing authority has broad discretion.” In re Servedio v. Bratton, 268 A.D.2d 356 (1st Dep’t 2000) (citation omitted). Nevertheless, the denial of a Premises License must have a rational basis in the record. Nash v. Police Dept. of City of New York, 271 A.D.2d 384 (1st Dep’t 2000). In an Article 78 proceeding, the court’s review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful procedures, whether it is arbitrary or capricious, or whether it was affected by an error of law. In re Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974). “The arbitrary or capricious test chiefly ‘relates to whether a particular action should have been taken or is justified \* \* \* and whether the administrative action is without foundation in fact.’” Id. (citation omitted). An administrative determination may also be set aside if the punishment or penalty imposed “is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one’s sense of fairness.” Id. at 233 (internal quotations and citations omitted). An applicant’s criminal history—including dismissed cases—can form the rational basis for denial of a Premises License, even if the applicant supplied positive, uncontested

character or job references. See e.g. Nash, 271 A.D.2d. at 384; Servedio, 268 A.D.2d at 356; Abramowitz v. Saffir, 293 A.D.2d 352, 353 (1st Dep't 2002). Furthermore, since a single violation of a firearm regulation is sufficient grounds for the NYPD to validly revoke a Premises License (see Beach v. Kelly, 52 A.D.3d 436 [1st Dep't 2008]; D'Onfrio v. Kelly, 22 A.D.3d 343 [1st Dep't 2008]), it follows that a single violation of a firearm regulation is enough to validly deny a Premises License outright.

Respondent had a rational basis for denying petitioner's application. Petitioner's desire to own and possess a firearm comes with the obligation that he know and follow the rules and regulations regarding firearms. This expectation is logical as well as legally mandated. Title 38 Section 5-07 of the Rules of the City of New York states that "[a]ll licensees shall be required to sign an acknowledgment that they shall be responsible for compliance with all laws, rules, regulations, standards, and procedures promulgated by federal, state, or local jurisdictions, and by federal, state, or local law enforcement agencies, that are applicable to this license." Petitioner showed his disregard for the rules by bringing his handgun into New York City in violation of Penal Law § 400.00(6), which states, in pertinent part, that "[a] license to carry or possess a pistol or revolver, not otherwise limited as to place or time of possession, shall be effective throughout the state, *except that the same shall not be valid within the city of New York unless a special permit granting validity is issued by the police commissioner of that city.*" (Emphasis added). It was thus rational for respondent to conclude, as it did, that petitioner's failure to comply with one regulation casts doubt on his ability to comply with other regulations.

Petitioner's reliance on DiStefano v. Kelly, 47 A.D.3d 928 (2d Dep't 2008), is misplaced. In DiStefano, the Second Department did hold that "the denial of the petitioner's application for a premises residence handgun license on the ground that the petitioner failed to timely renew his prior license or voucher his handgun was arbitrary and capricious." Id. at 929. However, the Court premised the decision on its determination that the petitioner reasonably failed to renew the license, because the NYPD conceded that the renewal form was sent to an incorrect address. Id. Here, there was no administrative error that prevented petitioner from obtaining a Premises License from respondent before his 2008 arrest. Furthermore, petitioner has no reasonable excuse for bringing an unlicensed firearm into New York City.

For the reasons discussed above, the petition is denied and the proceeding is dismissed.

This constitutes the decision, order, and judgment of this court.

Dated: January 27, 2010

  


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 JOAN B. LOBIS, J.S.C.

**UNFILED JUDGMENT**

**This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 147B).**